

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

BASHAS' INC., d/b/a BASHAS',
FOOD CITY, and AJ'S FINE FOODS

and

Cases 28-CA-21048
28-CA-21220
28-CA-21319

UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 99

Sandra L. Lyons, Esq., for the General Counsel.

Steven D. Wheeless, Esq. and
Alan M. Bayless Feldman, Esq., (*Steptoe & Johnson, LLP*)
of Phoenix, AZ, for the Respondent.

Michael C. Hughes, Esq., (*Davis, Cowell, & Bowe, LLP*)
of San Francisco, CA, for the Union.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Phoenix, Arizona, on July 24-26, 2007. The original charge was filed October 24, 2006,¹ and the order consolidating cases, second consolidated complaint and notice of hearing (herein the complaint) was issued June 29, 2007. The complaint alleges that Bashas', Inc., d/b/a Bashas', Food City and AJ's Fine Foods (herein Bashas') violated Section 8(a)(5) and (1) of the Act by: failing to bargain with United Food and Commercial Workers Union, Local 99 (herein the Union) about proposed changes in the health benefits program for unit employees and then unilaterally implementing changes to that program, withdrawing recognition of the Union as the bargaining representative of the unit employees, closing two of its facilities and transferring unit employees to other facilities, removing two existing unit employee-operated check-out stations and installing self-service check-out stations, and bypassing the Union and dealing directly with unit employees by offering and granting them transfers to other facilities.

Bashas' filed a timely answer that admits the allegations of the complaint concerning the filing and services of the charges, jurisdiction, that it is a successor to Arizona Supermarkets, Inc., (herein ASI) and ABCO Food Group, Inc., (herein ABCO) at certain facilities, the Union's labor organization status, and supervisory status. Bashas' primarily defends its conduct in this case by asserting that the Union had acquiesced in its pattern of treating its union and non union stores alike, citing *The Courier-Journal I and II*, 342 NLRB 1093 (2004) and 342 NLRB 1148 (2004).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Bashas',² and the Union, I make the following.

¹ All dates are in 2006 unless otherwise indicated.

² Bashas' unopposed motion to correct page 363, line 8 of the transcript to read "6-1-2002" instead of "6-1-2000" is granted.

Findings of Fact

I. Jurisdiction

5 Bashas', a corporation, is engaged in the retail sale of groceries, meat, and related products. Bashas' has an office and place of business in Chandler, Arizona, and stores in Arizona where it annually derives gross revenues in excess of \$500,000 and purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Arizona. Bashas' admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

15 Except as noted below, the material facts in this case are undisputed. Bashas' operates 160 grocery stores in and near the State of Arizona. It operates these stores under several different names. "A.J.'s Fine Foods" are gourmet, fine foods stores, "Bashas'" are conventional supermarkets, and "Food City" focuses on the Hispanic niche market. In about 1993 Bashas' purchased ASI, including what were to become stores 63, 64, 65, 66, 67, 68 and 69, all located in Arizona. At the time of the purchase the Union represented separate units of non meat department employees at each of the stores (herein the clerks units.)³ The last contract between ASI and the Union covering the clerks units expired September 18, 1994. At all times since the purchase, the Union has been the exclusive collective-bargaining representative of the employees in the clerks units. At the time of the purchase, the Union also represented separate units of meat department employees at each of the stores (herein the meat department units.)⁴ The last contract covering the meat department employees also expired September 18, 1994. Like the clerks unit, since the purchase the Union has been the collective-bargaining representative of the employees in the meat department units. Bashas' set the initial terms and conditions of employment for the employees in the former ASI units by extending Bashas' existing wages, benefits, and policies to those units.

30 Michael Proulx is Bashas' President and Chief Operating Officer. Pedro Tadeo served on the Union's Board of Directors; Tadeo also worked as a meat cutter for Bashas' at store 69; he then transferred to a nonunion store where he continued to work as a meat cutter until his retirement. He kept the Union informed of events occurring at Bashas'.

35 Bashas' recognized the Union as the collective-bargaining represented for the employees in the former the clerks and meat department units. On September 10, 1993, the Union informed the unit employees of the status of its bargaining with Bashas' over their existing terms and conditions of employment and commented that it was still their bargaining representative. Bargaining then followed beginning in 1993 for collective-bargaining agreements. However, no contract was ever reached and the parties stopped bargaining in 2002. No bargaining sessions have been held since then. During the bargaining period the Union and Bashas' met a number of times in face-to-face meetings, exchanged bargaining proposals and counter-proposals, and provided each other with information. The chief obstacles to reaching a contract were health insurance, pension, and job classifications; the Union wanted the employees to be covered by the plans and job classifications it had negotiated with other employers in the industry while Bashas' wanted the employees to remain covered by its plans and job classifications. However, the Union and Bashas' never presented each other with a final offer and no one contends that bargaining was at an impasse. As Paul Rubin, the Union's secretary-treasurer and

³ The parties agree that single-facility units of all employees but excluding all meat department employees and all guards and supervisors as defined in the Act are appropriate.

⁴ The parties agree that single-facility units of all meat department employees but excluding all other employees and all guards and supervisors as defined in the Act are appropriate.

executive assistant to the president explained, negotiations took a break and the Union continued to monitor the wage increases and changes that Bashas' made to its health insurance and pension plans to assure that they matched what the Union was achieving in its contracts with other unionized employers in the area.

5 Of course, the employees' working conditions changed during the years of bargaining. On February 9, 1995, Bashas' informed the Union that:

10 As we had earlier discussed and agreed, this is to confirm [that Bashas'] has placed into effect the eligibility of part-timers for medical, dental and vision benefits as proposed in its March 31, 1994 proposal to the union effective retroactively to March 31, 1994.

15 On December 16, 1996, Bashas' informed the Union by letter that it had increased the wage rates of employees consistent with the increase in minimum wage rate. It also advised the Union that it proposed to increase the minimum additional progression rates for the courtesy clerk employees as a consequence of the minimum wage rate increase for those employees. The letter continued:

20 Our proposals regarding wage changes in the old ASI stores has been on the table since last February and the time is now rolling around for the proposed increase, which [Bashas'] traditionally puts into effect shortly after the first of the year. It just occurred to me that I should not just assume that your earlier comments about putting these proposals into effect subject to whatever is finally agreed upon in negotiations applies to this year also. If my assumption that your earlier remarks included the proposed increases for January, please let me know so that [Bashas'] will not get into a disagreement with the Union over this issue.

25 By letter dated January 21, 1998, Bashas' informed the Union:

30 To follow through on [Bashas'] past practice of several years, here are the wage increases they propose and recently put into effect for employees in the seven former ASI stores. It is also [Bashas'] intent to make similar proposals based on the same amounts and percentages for 1999 and the year 2000. A breakdown for 1999 and 2000 will come under separate cover.

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In looking over the letter of agreement with some of the industry stores, it was not clear to me whether it was contemplated that pension contributions would be made for courtesy clerks or not. It also was not clear to me whether other industry proposals varied the terms of the so-called common agreements. Can you enlighten us on this? Also, what is the effective date of the \$35 pension benefit for past service? Is it January 1, 1998 for everyone? Can the \$50 per year of service pension benefit apply to 1997 if the individual had ten years of service before January 1, 1997? Please clarify this for me.

40 The reference to the agreement with some of the "industry stores" was to the collective-bargaining agreements reached between the Union and the major unionized retail stores in Arizona. In fact, Bashas' typically paid 5 cents more per hour at the journeyman rate than those collective-bargaining agreements called for. On December 29, 1999, Bashas' informed the Union:

45 This is the time of year Bashas' usually puts into effect wage increases, which generally track previously negotiated wage improvements in the industry. In the past it has been jointly agreed with the [Union] that Bashas' can also implement those wages and benefit improvements in the ASI Stores. . . .

50 I do not yet have in my hands the proposed improvements but will forward them to you when I get them. On the assumption that the [Union] is still willing to go along with the practice of implementing these improvements in the ASI Stores, unless we hear to the contrary from you we will go ahead on January 2, 2000 and implement the same improvements in the bargaining unit. . . .

Incidentally, [Bashas'] would also appreciate your sending them an up-dated copy of the

benefit booklets and the various eligibility criteria currently in effect in the Desert State Retirement Program and Plans. If the booklets have not been updated, please supplement them with a written explanation of changes currently in effect or about to go in effect during the current industry agreement.

5 In about 2001, while contract bargaining was still occurring, Bashas' purchased ABCO, including what were to become stores 124 and 125, both located in Arizona. At the time of the purchase the Union represented separate units of non meat department employees at each of the stores. The most recent collective-bargaining agreement between ABCO and the Union covering these employees expired
10 October 29, 2000. At the time of the purchase the Union also represented separate units of meat department employees at each of the stores. The most recent collective-bargaining agreement between ABCO and the Union covering these employees also expired October 29, 2000. On September 7, 2000, Bashas' and the Union signed a recognition agreement whereby Bashas' recognized the Union as the bargaining agent for the former ABCO units. At all times since the purchase of the ABCO stores by Bashas', the Union has been the collective-bargaining representative of the employees in the meat
15 department and clerks units. The parties agreed that the negotiation for the ABCO stores would become part of the ongoing negotiations for the former ASI stores.

On June 13, 2001, the Union provided Bashas' with information on certain provisions of the Union's most recent collective-bargaining agreement with the unionized food industry employers in Arizona. On January 8, 2002, Bashas' informed the Union that it was granting wage increases to the
20 former ASI unit employees consistent with the practice described above; the letter also advised that Bashas' would be granting those wage increases to the former ABCO unit employees as well.⁵ On April 10, 2002, the Union requested information for unit employees, including wage rates, dates of hire, pension and health and welfare information. The Union renewed that request on May 3, 2002, and on May 8, 2002, Bashas' gave the Union the requested information.

25 The wage increases and other benefit changes described in the preceding paragraphs were made company-wide and not just for the unit employees in the nine stores the Union represented. Bashas' also made other changes, including to its pension plan and disability and insurance plan. Changes in health benefits are described below. These changes too were made company-wide; the nine union-represented stores did not receive unique wages and benefits or operate under different policies.
30 Employees were notified of these changes as they occurred.

Other changes were made as well. For example, Bashas' implemented a new system that reduced the hours worked by bookkeepers. It added a natural choice line of products that resulted in the creation of a new position – a natural choice clerk. It expanded the deli department by adding a chef
35 entrée program; this resulted in the new position of certified chefs. Store 69 was originally operated as a Bashas' type supermarket. However, when Bashas' opened another store nearby it converted store 69 into a Food City supermarket. About half the workforce from store 69 transferred to the newly-opened Bashas'. The transfers were arranged by Bashas' Human Resources Department whose personnel met with the employees at store 69 and asked them of their desire to transfer to the new store or remain at
40 would become a Food City supermarket. Store 69 closed for a week to make the transition to Food City. During that time the employees who opted to remain there worked on the remodeling that took place. Check cashing stations were added to a number of stores, including stores 69 and 124. This change resulted in the creation of a new job classification that in stores 69 and 124 was considered part of the recognized unit. Some stores bake certain of their bakery products from scratch. Bashas' decided that stores 69 and 124 should start to do so also. As a result of this change new baker positions were added.

45 ⁵ I have considered Proulx' testimony that Bashas' based its wage increases on what the industry was doing and that this included its unionized competitors as well as *nonunion competitors* such as Wal-Mart, Costco, and Albertsons'. I do not credit this testimony. This testimony was given in summary fashion, no documents were provided to support this contention and the letters exchanged between
50 Bashas' and the Union tell a different story – namely, that Bashas' generally granted its wage increases based on what the Union had achieved in collective bargaining agreements with the unionized employers in Arizona.

Some stores, including stores 69 and 124 changed from a completely self service meat department to a service meat department where customers could request specially cut meat items. There is no evidence that Bashas' advised the Union of any of these changes that affected the union-represented stores. Similarly, there is no evidence that the Union ever requested bargaining over any of these matters or protested Bashas' conduct.

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B. Alleged Unfair Labor Practices

1. Health plan allegations

The complaint alleges that Bashas' violated Section 8(a)(5) by unilaterally making changes to the health benefits program that it offered to unit employees. In that regard, Bashas' had never required employees to pay any portion of their health care insurance premiums. On January 30, 2006, however, Bashas' informed all employees, including employees in the recognized units, that it was making changes to its health benefits program effective June 1, 2006. The new program allowed employees to select one of two plans. Under plan A, which was the existing plan, both full-time and part-time employees would have to pay from \$10 to \$30 per week, depending on the coverage. This was the first time employees would be required to share in the costs of their health care premiums. Under plan B, which offered less coverage, full-time employees would not be required to make payments, but part-time employees would. In a memorandum to store directors and management teams, Bashas' explained the changes as follows:

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Market conditions now compel us to change the status quo and on June 1st of this year we will ask all of our [employees] that choose to participate in our current group health insurance plan to begin to share those costs with us. At the same time, however, we will introduce a new, free, more basic plan for those hired after February 1, 2006, and for current [employees] who may want to choose it over our current plan so their "premium-free" can continue. The newly created member contributions [premiums] for the continuation of our current plan, which will feature some enhancements, will range from \$10 to \$30 dollars per week depending upon election.

Waiting periods to become eligible for the plans were also changed. Bashas' anticipated that employees would ask questions regarding the changes and it prepared answers to questions such as "Why do we have to contribute to our healthcare after all these years of Bashas' paying for it?" and "Isn't there something else Bashas' could do to keep things as they are?"

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On about May 18, the Union sent Bashas' a letter that stated:

As you are aware, [the Union] represents the employees at certain Bashas' stores. The [Union] has had negotiations with Bashas' concerning those employees and has monitored the terms and conditions the employees have been under, including changes thereto. In the past, we have either consented to or did not object to the changes. It has come to our attention that Bashas' contemplates changes in the medical plan it provides to the employees represented by the [Union.] [The Union] hereby requests a meeting with Bashas' to negotiate these proposed changes.

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Bashas' admits that it did not bargain with the Union concerning the announced changes and that on about June 1, it implemented those changes to the health benefits program that it provides to all employees, including the unit employees represented by the Union.

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Over the years Bashas' has made a number of changes to its health benefits program. For example, in 1994 Bashas' made minor technical clarifications to eligibility and participation conditions and clarified covered and non-covered expenses. In 1995 pre-existing conditions were covered up to \$1000 for the first 12 months, the co-pay percentage for non-PPO providers increased from 65% to 70% for covered services, well baby, wellness/preventive, and smoking cessation benefits were implemented, hearing impairment services were added, and dental benefits were increased. In 1996 the schedule of covered benefits for physician services was changed. In 1999 part-time employee eligibility was changed from an average of 260 hours worked over 2 calendar quarters to an average of 20 hours per week

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worked over a 6-month period. In 2002 eligibility requirements for dental/vision care benefits were reduced, coverage for routine-elective male newborn circumcision was added, in-network behavioral health benefits became subject to co-pay requirements, the dollar limits for prosthetics were increased, a chronic disease management program was added, co-pays for emergency room and urgent care visits were added, a \$500 lifetime maximum limit for contraceptives was imposed, annual dental and lifetime orthodontia limits were increased, among other changes. In 2003 the co-pay for generic and brand name drugs were increased. In 2005 specialty drug benefits were added and a maximum co-payment for these drugs was set at \$100. Also in 2005 employees who failed to maintain an average of 32 or more hours worked as full-time employees lost that eligibility for benefits.

Analysis

Bashas' contends that this allegation in the complaint is time barred under Section 10(b). It argues that the changes were implemented on June 1, yet a specific amended charge was not filed covering this matter until December 20, after the 6-month limitation mandated by Section 10(b). The General Counsel counters by pointing to the original charge filed on October 24 alleging that Bashas' "on or about June 1, 2006, unlawfully withdrew recognition of [the Union] as the exclusive collective-bargaining agent of Bashas' employees at the nine stores identified below." In deciding whether a timely filed charge is broad enough to cover an untimely amended charge for 10(b) purposes, the Board applies a three-part test to determine if the amended charge is closely related to the original charge. *Redd-I, Inc.*, 290 NLRB 1115 (1988). First, the Board examines whether the otherwise untimely allegations involve the same legal theory as the allegations in the timely charge. Here, both allegations involve violations of Section 8(a) (5). But the allegation of the timely charge is that Bashas' unlawfully withdrew recognition from the Union; that legal theory is distinct and separate from allegations of unilateral changes in health insurance benefits. Second, the Board examines whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge. Here, while both allegations occurred the same day, the allegations of unlawful withdrawal of recognition center on statements made by Bashas' in its civil trespass lawsuit against the Union, as more fully described below. This factual situation is separate and distinct from the allegation concerning the changes made in the health insurance plans. Each goes along its separate factual path. *Carney Hospital*, 350 NLRB No. 56 (2007). Third, the Board considers whether the defenses raised against allegations made in both the timely and untimely allegations are the same or similar. Here, the defenses are markedly different in that Bashas' asserts it was privileged to make the changes in health care insurance by virtue of a long history of acquiescence by the Union, while it defends the withdrawal of recognition allegation on the basis that it never did withdraw recognition. The General Counsel, in his brief, makes no mention of *Redd-I* and he does not specifically address the three-part test contained therein. The Union does not address the 10(b) issue in its brief. Under these circumstances I am unable to conclude that the amended charge is sufficiently related to the timely charge so as to support the allegations in the complaint. Rather, I conclude that the allegations in the complaint concerning changes made to the health insurance plan are barred by Section 10 (b). Accordingly, I dismiss these allegations.

2. Withdrawal of recognition allegation

Next, the complaint alleges that on about June 1, Bashas' withdrew its recognition from the Union as the exclusive collective-bargaining representative of the unit employees. Bashas' denies that it has withdrawn recognition from the Union. To support this allegation the General Counsel relies on a lawsuit filed by Bashas' on June 1, 2006, in Arizona Superior Court against the Union. The complaint alleged that the Union, through its agents, trespassed and engaged in other unlawful conduct at store 64 and elsewhere. The complaint stated that the Union "does not represent Bashas' employees." Of course, as pointed out above, the Union did represent the unit employees at store 64. The Union filed a motion to dismiss that pointed out, among other things, that the Union does represent some of Bashas' employees, including those at store 64. Bashas' response to the motion to dismiss included:

The Union's Motion makes unsubstantiated and untrue allegations that the Union represents employees at [Bashas'] Store No. 64. Needless to say, the Union's false allegations are disputed by [Bashas'].

...

The Union's conduct reveals the insincerity of its claim that it had some representational rights over the employees in Store 64. If the Union actually represented these employees, it would be able to obtain the names of employees from Bashas' via an informational request.

5 ...
As explained above, the Union is not the representative of the employees it was attempting to contact.

In a position statement dated August 18 and given to the Board's Regional Office, Bashas' stated:

10 Finally, whatever recognitional claims the Union may have are seriously undercut and undermined by Union abandonment, inaction, and conduct over literally years, amounting or tantamount to a disclaimer of interest.

15 In answer to the original complaint issued in this case on December 28, Bashas' denied that the Union was the Section 9(a) representative of the unit employees. It pled as affirmative defenses that the Union has lost:

20 any arguable, purported status as the recognized collective bargaining agent of any collective bargaining unit of any of Respondent's stores . . . by its abandonment of the employees comprising any alleged collective bargaining unit.

and

25 The Union has waived and is estopped from claiming recognition based upon a consistent pattern of inaction and its utter absence of representation with respect to the employees constituting any arguable collective bargaining unit purportedly represented by the Union, such pervasive pattern of inaction amounting to a disclaimer of interest.

30 In answer to the first consolidated complaint issued on March 30, 2007, Bashas' again denied that the Union was the Section 9(a) representative of the unit employees and again claimed that the Union abandoned the bargaining unit employees and lost majority support from the bargaining unit employees. In answer to the second consolidated complaint that issued June 27, 2007, however, Bashas' admitted the Union's Section 9(a) status and no longer asserted that the Union had lost the right to represent the unit employees. The Union then filed a motion to preclude Bashas' from offering evidence at the trial that challenged the Union's status as the bargaining representative of the unit employees. In response to this motion Bashas' filed an amended answer and then a second amended answer that no longer admitted the Union's Section 9(a) status and affirmatively pled the Union disclaimed recognition by its conduct of inaction. At the hearing in this case Bashas' denied that it has withdrawn recognition and instead acknowledged its continued obligation to bargain with the Union as the representative of the employees in the several units and does not argue otherwise in the brief it submitted after the trial.

Analysis

40 There is no evidence in this case to justify a withdrawal of recognition under *Levitz Furniture Co.*, 333 NLRB 717 (2001). There is no question that Bashas' misrepresented a material fact in its filings before the Arizona Superior Court when it twice represented to that Court that the Union did not represent employees at store 64. Bashas' asserts that the statements in its lawsuit against the Union did not amount to a withdrawal of recognition.⁶ It argues that those statements should be viewed in context. Citing *Signal Transformer Co.*, 265 NLRB 272 (1982) and *Glover Bottle Glass Corp.*, 292 NLRB 873, 885 (1989), Bashas' argues that in context the statements in the trespass lawsuit did not rise to the level of a withdrawal of recognition. But the cited cases dealt with statements that were both ambiguous and isolated. Moreover, Bashas' continued to repeatedly deny in its pleadings in this case that the Union was

50 ⁶ Proulx testified that the assertion in Bashas' initial filing meant only that the Union did not represent all of Bashas' employees. But Bashas' subsequent filings refute this testimony and I do not credit it.

the Section 9(a) representative of the unit employees. Its tardy acknowledgement at the hearing in this case that the Union indeed did represent the employees is entitled to less weight because it earlier acknowledged this fact in its answer to the second consolidated complaint only to quickly withdraw that acknowledgement and reassert its previous position. In context, Bashas' conduct was tantamount to a withdrawal of recognition. The Union is entitled to an unambiguous assurance from Bashas' that Bashas' recognizes the Union as the collective bargaining representative of the unit employees and one that is not contingent upon the preferred legal strategy of the day. By withdrawing recognition from the Union as the collective-bargaining representative of the unit employees, Bashas' violated Section 8(a) (5) and (1).

3. Store closing allegations

On about December 3 and April 9, 2007, Bashas' closed stores 125 and 68, respectively, and transferred the unit employees working there to other facilities. In fact, Bashas' converted store 125 into an Ike's Farmer Market, the first of its kind store that featured organic produce, natural foods, supplements, and healthy lifestyle living items. This store opened in May 2000.⁷ The complaint also alleges that Bashas' unlawfully bypassed the Union as the exclusive collective-bargaining representative of the transferred employees by dealing directly with the employees concerning the transfers. The evidence shows that Bashas' closed these stores without giving specific notice to the Union. Bashas' decided to offer employees working at these stores transfers to other Bashas' stores near the employee's home or in the vicinity of the store being closed. The offers of transfer were dependent on the availability of the position at the store the employee desired to transfer to; not all first choices were granted. The evidence shows, and Bashas' admits, that Bashas' dealt directly with the employees concerning their transfers to other stores. All unit employees ultimately accepted the transfer offers made to them.

Bashas' began informing the employees and the community of the closing of store 125 as early as January. As part of the gradual closedown process, about 40 employees and the store manager from store 125 transferred to a nearby Bashas' store when it open around March; store 125 thereafter operated with a much reduced staff until it closed in December. Union Agent Lillian Flores testified that she visited store 125 from time to time. During a visit in June a number of employees advised Flores that the store would be closing and that the employees were not certain what would happen to them. Moreover, the appearance of the store also lent credibility to the reports from the employees. Flores advised her superior in the Union of this information, but the Union never made a request to bargain with Bashas' over effects of the closing on unit employees. Unlike store 125, Bashas' announced the closing of store 68 on March 21, less than three weeks prior to its closing.

Over the years there have been scores of voluntary transfers out of and into the union-represented stores pursuant to Bashas' transfer policy and there has been no objection from the Union. Bashas' points out that Tadeo, a member of the Union's Board of Directors, applied for a transfer out of store 69 on August 31, 2000, using Bashas' transfer procedures.⁸ As the General Counsel points out in his brief, there is no evidence that the employees transferred as a result of the closing of stores 125 and 68 were offered additional compensation or other benefits resulting from any inconvenience or hardship caused by the transfers, nor is it known whether the former unit employees worked reduced hours after the transfers.

⁷ There is no allegation in the complaint that Bashas' unlawfully failed to recognize the Union at the newly converted Ike's Farmer Market.

⁸ Michael Gantt, Bashas' senior vice president for human resources, testified that during bargaining with the Union proposals were exchanged relating to job training and in those proposals there was language concerning job transfers. Gantt did not further elaborate, and the proposals themselves were not offered into evidence. Gantt's testimony, though unrebutted, was not corroborated. Given these factors and Gantt's earlier inaccurate testimony on the subject of transfers, I give this testimony little weight.

Analysis

As a preliminary matter, Bashas' argues that the Union acquiesced in its policy of making changes to the union-represented employees on the same basis as it treated its non unit employees. While Bashas' makes this argument primarily in defense of the changes it made in its health benefits program, and I have dismissed that allegation on 10(b) grounds and thus found it unnecessary to pass on the contention in that context, Bashas' makes the same argument for the remaining allegations of unilateral changes raised in the complaint. Among other things Bashas' points to the fact that during negotiations it advised the Union that it was treating the unit employees the same as it was treating the non unit employees, that in fact it did so, that the Union knew or should have known that it was doing so, and the Union never objected to this practice. However, this argument over simplifies a more complex history. Concerning wages, for example, Bashas' indeed treated all stores – union and non union – alike. But the wage changes Bashas' made generally followed the pattern of what the Union gained in bargaining with major union-represented employers in the Arizona. Thus, the practice would not allow Bashas' to, for example, cut wages in the union-represented stores merely because Bashas' did so in its non union stores. Bashas' cites *The Courier-Journal*, 342 NLRB 1093 (2004) and *The Courier-Journal*, 342 NLRB 1148 (2004). In the *Courier-Journal* cases the respondent had a past practice for many years of making changes to the employees' costs and benefits of its health insurance program. The practice included making the same changes for employees represented by the union there as for non unit employees. When the union there discovered that the respondent was planning on again changing the costs and benefits levels of the health insurance plan on January 1, 2002, the union objected and indicated that it wanted to negotiate specific health insurance benefits for the unit employees. The respondent nonetheless proceeded to make the changes as planned. The Board dismissed the allegation that the respondent acted unlawfully by doing so. It reasoned that a practice had developed that allowed the respondent to make those changes and the practice could continue until changed by bargaining. The *Courier-Journal* cases do not govern the store closing allegations in this case. Of course, Bashas' has unilaterally closed many stores where the employees were not represented by the Union and it dealt directly with the employees at those stores. But this, of course, simply stems from the fact that those were non union stores. Unlike in *Courier-Journal*, in this case there was no past practice of how union-represented employees would be treated in the event of a store closure, much less any Union acquiescence in any practice. *Berkshire Nursing Home*, 345 NLRB No. 14 (2005) slip op. at 1, fn. 2.

Some analysis is needed to determine whether the General Counsel contends that Bashas' unlawfully failed to bargain with the Union concerning the *decision* to close stores 125 and 68 and, if so, what is the General Counsel's theory. The complaint lists the allegations that Bashas' implemented changes in the health insurance program, installed a self-service check-out station and closed stores 125 and 68. The complaint then alleges that Bashas' engaged in all of that conduct without affording the Union an opportunity to bargain "with respect to this conduct and the effects of this conduct." The complaint, therefore, appears to allege that Bashas' closed stores 125 and 68 without first bargaining with the Union about the decision to do so. However, one section of the General Counsel brief is entitled "Respondent Violated Section 8(a) (1) and (5) by Failing to Notify the Union and Bargain over the Closure of Store 68." The next section in the brief is entitled "Respondent Violated Section 8(a)(1) and (5) by Failing to Notify the Union and Bargain over effects of Store 125's and Store 68's Closures." No explanation is given as why the complaint alleged a violation as to the decision to close both stores but in the brief only store 68 is mentioned. Moreover, in the conclusion section of the brief the General Counsel specifically seeks a remedy "that would require Respondent to bargain with the Union regarding the effects of Store 125 and Store 68 closing," but it makes no mention of a remedy for a *decisional* violation for either store. In the proposed notice the General Counsel seeks language that:

WE WILL immediately negotiate an agreement with the Union as to all matters relating to the reinstatement of [store 68 and store 125] bargaining unit employees to their former positions of employment or substantially equivalent positions of employment, without loss of seniority or other benefits, at our [store 68 and store 125] facility.

In the section of the brief containing the argument as to how Bashas' was required to bargain over the decision to close store 68 the General Counsel's argument, in its entirety, is:

5 The decision to close a facility and relocate operations can be considered a mandatory subject of bargaining and something an employer must give notice and an opportunity to bargain over in certain circumstances. *Dubuque Packing*, 303 NLRB 386 (1991), holds that if the relocation of unit work is unaccompanied by a basic change in the nature of the employer's operations, it becomes a mandatory subject of bargaining. *Id.* at 396.⁹

10 The Union only makes the identical argument in its brief. The problem with this argument is that *Dubuque Packing* involved the relocation of unit work; there is no allegation in the complaint that Bashas' relocated unit work and that matter was not litigated. Moreover, there is no evidence in the record to show that Bashas' relocated unit work as opposed to transferred unit employees. I conclude that any allegation concerning an unlawful failure to bargain over the decision to close store 125 and store 68 should be dismissed.

15 Turning now to the allegations concerning effects bargaining, it is undisputed that Bashas' failed to notify the Union of the closings of these two stores so as to give the Union a meaningful opportunity to bargain concerning the effects of the closing on unit employees.¹⁰ As the Supreme Court has made clear, a union is entitled to notice and an opportunity to bargain about the effects of a closing even if the decision to close does not require bargaining with the Union. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981). The fact that no unit employees were terminated as a result of the closing does not excuse the failure to bargain concerning the effects of the closing on unit employees. *AG Communication Systems Corp.*, 350 NLRB No.15 (2007). By failing to give the Union notice and an opportunity to bargain concerning the effects of closing stores 68 and 125 on unit employees, Bashas' violated Section 8(a)(5) and (1).

25 I turn next to the allegation that Bashas' violated Section 8(a) (5) by dealing directly with employees concerning their transfers to other stores. Generally, an employer violates the Act when it deals directly with union-represented employees concerning the employees' terms and conditions of employment. *Southern California Gas Co.*, 316 NLRB 979 (1995). But here the evidence shows that Bashas' has dealt directly with unit employees for years concerning transfers made pursuant to its existing transfer policy; this was done without objection by the Union. Bashas' did nothing different in this case. Of course, I have concluded that Bashas' unlawfully failed to give the Union an opportunity to bargain concerning the effects of the store closings. That bargaining could have resulted in a different transfer policy when store closings are involved and different considerations might come into play concerning whether Bashas' could still deal directly with employees on the subject of transfers under those circumstances, but that simply is speculative at this time. The point is that the complaint alleges the direct dealing as a separate violation but the evidence shows Bashas' simply continued to do what it had done in the past without objection from the Union. I further note that below I require Bashas' to bargain with the Union concerning the effects of the store closings; this requires Bashas' to bargain with the Union over the transfers. I shall dismiss this allegation in the complaint.

4. U-scan allegation

40 On about December 14, Bashas' removed two existing employee-operated checkout stations and installed a self-checkout lane at store 124. The U-scan unit had four stations where customers scanned their purchases, inserted cash or credit card, received change, and bagged their groceries. At the regular checkout lanes unit employees had scanned the purchases, received cash and returned change,

45 ⁹ That section of the brief continues by citing *Freedman Die Cutters, Inc.*, 340 NLRB 422 (2003) and *Daniel I. Burk Enterprises*, 313 NLRB 1263 (1994), but those cases do not involve decisional bargaining but instead deal only with effects bargaining.

50 ¹⁰ I note that Bashas' does not argue that the Union had constructive notice of the closings such to trigger a request to bargain even in the absence of actual notice from Bashas'. In any event there is no evidence that the Union had any constructive notice of the closing of store 68 and Bashas' began the close down process for store 125 in about March by transferring 40 employees to a newly opened store located nearby and there is no evidence that the Union had constructive notice of the closing at that time.

and bagged the purchases. One cashier was stationed at the U-scan unit; this cashier monitored the transactions of the customers on a screen and provided assistance to the customers as needed. Cashiers received training to these functions; because multitasking skills were required not all cashiers became equally proficient at performing these functions and only a small number have been assigned to operate the U-scan unit.

U-scan units had been and were being introduced into nonunion stores as well. In explaining the introduction of the self-checkout system Bashas' stated that it:

[W]ill provide a new checkout method for express checkout customers. Our customers have asked for this feature after seeing it at other retailers, and we are excited about giving them a chance to use it at our stores. Although our competitors have used self-checkout to reduce store labor cost (and eliminate jobs), Bashas' intends to do just the opposite. We view the **Fast Lane** as an additional store service that will help us to exceed customer expectations by adding an alternative checkout method to our busy front ends. We will continue to provide exceptional one-on-one service to our customers as they come to our stores. The **Fast Lane** will be monitored by a well-trained cashier at all times and will be open 8 a.m. to 10 p.m. each day.

Bashas' never gave the Union notice of its intention to install the U-scan station at store 124. Proulx testified that the U-scan unit was installed to improve customer service and not to reduce labor costs. Similarly, Thomas Swanson, Bashas' vice president and general manager for the Food City stores, testified that the U-scans were not introduced in an effort to save labor costs and, in fact, the U-scans had not saved labor costs. In support of that testimony Bashas' points to evidence in the record that the number of hours worked by cashiers in store 124 increased after the installation of the U-scan unit. However, that evidence is of little use because hours usually increase in the winter months as more people come to area to escape the colder weather in other parts of the country. Rubin, moreover, credibly testified that in his experience use of the U-Scan stations reduces the number of hours worked by cashiers.

Over the years cash registers have been added, removed and moved around in the stores. For example, store 63 was completely remodeled and the bistro department, which had one cash register, was expanded to add an Italian kitchen, a cappuccino machine, and a smoothie machine. Business in that department basically tripled and a second cash register was added there. In addition, a pharmacy and a sushi bar were added; each had its own cash register. In store 64, for example, the older, bulkier cash registers were replaced by cash registers with flat screen models and the check stands were reconfigured to leave a smaller footprint at the front end of the store. In store 68 two checkout stands, each having one cash register, were removed and replaced with a customer service stand that had its own cash register.

Analysis

An employer violates Section 8(a) (5) when it unilaterally changes the working conditions of employees who are represented by a Union. *NLRB v. Katz*, 369 U.S. 736 (1962). The changes, however, must be material, substantial, and significant. *Crittenton Hospital*, 342 NLRB 686 (2004). Here, as pointed out above, all cashiers had to undergo training to operate the U-scans and not all cashiers were equally able to perform the new functions. Moreover, as the General Counsel points out in his brief, there are issues of whether the U-scan cashiers should receive a higher rate of pay because of the different type of function they perform and whether there will be consequences for the cashiers that are unable to grasp the new skills involved in operating a U-scan unit. At a minimum, it seems work opportunities for these cashiers will diminish. This is especially the case if Bashas' continues the process of converting more traditional cash registers to U-scan stations. Work schedules were also revised as a result of the installation of the new technology. While Bashas' portrayed the introduction of the U-scans as unrelated to reduction in labor costs, I have credited testimony that the long-run impact of use of the U-scans can save labor costs and therefore result in less work for the unit employees. After all, it is undisputed that under the new process customers perform functions previously performed by unit employees. And use of the U-scans has the potential of having one cashier oversee the checkout of four

customers at one time. I conclude that the changes in working conditions resulting from the introduction of the U-scan are significant.

Bashas' again argues that it was privileged to introduce the U-scan without bargaining with the Union based on its *Courier-Journal* argument. But the same reasoning I described above in rejecting that argument applies here too – there is no evidence that Bashas' had previously introduced this new technology in its union-represented stores, much less any evidence that the Union had agreed to any previous introduction. Bashas' also relies on the evidence, set forth in detail above, that it has made many changes to the location of cash registers in the union-represented stores and introduced new cash registers with more modern technology. But none of those changes resulted in such a dramatic break from the past as here where customers are performing what was formerly unit work. I conclude that by unilaterally introducing the U-scan unit without first giving the Union notice and an opportunity to bargain about the introduction and its effects on unit employees, Bashas' violated Section 8(a)(5) and (1).

Conclusions of Law

Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a) (5) and (1) and Section 2(6) and (7) of the Act by:

1. Withdrawing recognition from the Union as the collective-bargaining representative of the unit employees
2. Failing to give the Union notice and an opportunity to bargain concerning the effects of closing stores 68 and 125 on unit employees.
3. Unilaterally introducing a U-scan unit without first giving the Union notice and an opportunity to bargain about the introduction and its effects on unit employees.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I have concluded that Bashas' unlawfully failed to give the Union an opportunity to bargain concerning the effects on unit employees of the closing of stores 68 and 125. The General Counsel argues that a remedy under *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), is necessary to remedy that violation. A *Transmarine* remedy, as clarified in *Melody Toyota*, 325 NLRB 846, 846 (1998), requires that an employer bargain over the effects of its decision, and provide unit employees back pay at the rate of their normal wages when last in the employer's employ from 5 days after the date of the Board's decision, until the occurrence of one of four specified conditions. Bargaining must take place and back pay be paid until either: (1) the parties reach agreement; (2) the parties reach a bona fide bargaining impasse; (3) the union fails to request bargaining within 5 days of the Board's decision or to commence negotiations within 5 days of the employer's notice of its desire to bargain; or (4) the union ceases to bargain in good faith. In no event, however, shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the employer closed its facility, to the time they secured equivalent employment elsewhere, or the date on which the employer shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the employer's employ. Back pay shall be based on earnings which the employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Board has recently confirmed that a *Transmarine* remedy is the standard remedy in effects bargaining cases. *AG Communication*, supra, slip op. at 5. Bashas' argues that this remedy is not appropriate in this case because all unit employees accepted transfers and therefore did not become unemployed or lose wages or other benefits as a result of the closing. But a *Transmarine* remedy is not designed only to make employees whole for loss of wages. Instead, a purpose of this remedy is to restore to the Union the bargaining leverage it would have enjoyed had the employer engaged in effects bargaining with the Union. "[T]he need for a *Transmarine* remedy is not vitiated by the [employer's] offer

of jobs to the unit employees at the new facility.” *Sea-Jet Trucking Corp.*, 327 NLRB 540 (1999). Bashas’ relies heavily on *AG Communication*, supra. However, there the Board concluded that under the “unusual circumstances” of that case “there appears to be little or nothing left over which to bargain.” *Id.* slip op. at 6. Here, there is much left for bargaining. As noted above, there is no evidence that the employees transferred as a result of the closing of stores 125 and 68 were offered additional compensation or other benefits resulting from any inconvenience or hardship caused by the transfers, nor is it known whether the former unit employees worked reduced hours after the transfers. These are some subjects that could have been addressed in effects bargaining. Also as noted above, the Union could have bargaining over a different transfer procedure in instances of store closings. This might have covered matters such as preferential treatment for the employee’s first choice of where to transfer. It could have covered preferential treatment for transfer to the Ike’s Farmer Market that Bashas’ opened in place of store 125. Moreover, the Board in *AG Communication* deemed it significant that the employees there continued to be represented by a union, albeit a different union than the one which originally represented them. It follows that it must be significant in this case that the employees were transferred to nonunion stores. I conclude that the unusual circumstances present in *AG Communication* are not present in this case. I further conclude that a *Transmarine* remedy is necessary to restore to the Union some bargaining leverage so that meaningful effects bargaining will occur with Bashas’.

I have also concluded that Bashas’ unlawfully introduced the U-scan unit without first giving the Union notice and an opportunity to bargain about the introduction and its effects on unit employees. In order to provide the Union with a meaningful opportunity to bargain about this matter I shall require Bashas’, upon request of the Union, to remove the U-scan unit and restore the status quo that existed prior to the installation.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, Bashas’ Inc., d/b/a Bashas’, Food City, and AJ’S Fine Foods, Chandler, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Withdrawing recognition from the Union as the collective-bargaining representative of the unit employees.
- (b) Failing to give the Union notice and an opportunity to bargain concerning the effects of closing stores on unit employees.
- (c) Unilaterally introducing the U-scan unit without first giving the Union notice and an opportunity to bargain about the introduction and its effects on unit employees.
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Recognize, and on request, and bargain with the Union as the exclusive representative of the employees in the following appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Single facility units of all employees employed at the seven former ASI stores, but

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

excluding all meat department employees and all guards and supervisors as defined in the Act.

Single-facility units of all meat department employees employed at the seven former ASI stores, but excluding all other employees and all guards and supervisors as defined in the Act are appropriate.

All meat department employees employed at Bashas' Store 125, located at 13005 N. Oracle Road, Oro Valley, Arizona, 85739 and all meat department employees employed at Food City Store 124 located at 2800 West 16th Street, Yuma, Arizona, 85364, excluding all other employees, guards and supervisors as defined in the Act.

All other employees employed at Bashas' Store 125, located at 13005 N. Oracle Road, Oro Valley, Arizona, 85739 and all other employees employed at Food City Store 124 located at 2800 West 16th Street, Yuma, Arizona, 85364, excluding all meat department employees, guards and supervisors as defined in the Act.

(b) Bargain with the Union concerning the effects of closing stores 125 and 68 and pay the employees transferred as a result of the closings the amounts of money with interest according to the standard set forth in the remedy section of this decision.

(c) Upon request of the Union, remove the U-scan unit and restore the status quo that existed prior to the installation and give the Union notice and opportunity to bargain about the matter before doing so again.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities involved in this proceeding, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 2006.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. , October 10, 2007.

William G. Kocol
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT withdraw recognition from **UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 99 as the collective bargaining representative of the unit employees.**

WE WILL NOT fail to give the Union notice and an opportunity to bargain concerning the effects of closing stores on unit employees.

WE WILL NOT unilaterally introduce U-scan units without first giving the Union notice and an opportunity to bargain about the introduction and its effects on unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL RECOGNIZE, and on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

Single facility units of all employees employed at the seven former ASI stores, but excluding all meat department employees and all guards and supervisors as defined in the Act.

Single-facility units of all meat department employees employed at the seven former ASI stores, but excluding all other employees and all guards and supervisors as defined in the Act are appropriate.

All meat department employees employed at Bashas' Store 125, located at 13005 N. Oracle Road, Oro Valley, Arizona, 85739 and all meat department employees employed at Food City Store 124 located at 2800 West 16th Street, Yuma, Arizona, 85364, excluding all other employees, guards and supervisors as defined in the Act.

All other employees employed at Bashas' Store 125, located at 13005 N. Oracle Road, Oro Valley, Arizona, 85739 and all other employees employed at Food City Store 124 located at 2800 West 16th Street, Yuma, Arizona, 85364, excluding all meat department employees, guards and supervisors as defined in the Act.

WE WILL give the Union notice and an opportunity to bargain concerning the effects on unit employees of closing our stores.

WE WILL bargain with the Union concerning the effects of closing stores 125 and 68 and pay the employees transferred as a result of the closings the amounts of money with interest according to the standard set forth in the remedy section of this decision.

WE WILL, upon request of the Union, remove the U-scan unit and restore the status quo that existed prior to the installation and give the Union notice and opportunity to bargain about the matter before doing so again.

**BASHAS' INC., d/b/a BASHAS', FOOD CITY, and
AJ'S FINE FOODS**

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.